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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN NATIONAL BANK AND TRUST COMPANY

FALLON KELLY
500 Minnesota Building
St. Paul, Minnesota 55101

Counsel of Record for
Respondent American
National Bank and Trust
Company

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TABLE OF CONTENTS

	PAGE
Statutes and Regulations Involved	1
Argument	4

TABLE OF AUTHORITIES

Ass'n of Data Processing Service Organization v. Camp, 279 F. Supp. 675 (D. Minn. 1968) 406 F. 2d 837 (8th Cir. 1969)	5
Curtis v. Leavitt, 15 N.Y 9 (1857) (No other citation available)	4
Wingate Corporation v. Camp 408 F. 2d (1st Cir. 1969)	5
Statutes and Regulations	
12 U.S.C. § 24	1, 4
5 U.S.C. § 702	5
12 U.S.C. § 1861-1864	2, 6, 7
12 U.S.C. § 339	6, 9
12 U.S.C. § 1841-1842	3, 7
Comptroller's Manual for National Banks § 3500	5
Legislative Materials	
H.R. 8874, 87 Cong. 2nd Sess. 1962	7, 8
S.R. 727, 90 Cong. 1967	10
H.R. 10595, 90 Cong. 1967	9, 10
108 Cong. Rec. 16500	9

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STATUTES INVOLVED

The pertinent Section of the National Bank Act, 12 U.S.C. 24, Seventh, provides in part:

> "Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as

such, and in the name designated in the organization certificate, it shall have power—

* * * * *

"Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *"

Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. 1864, provides:

"No Bank service corporation may engage in any activity other than the performance of bank services for banks."

Subsection (c) of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1861, provides:

"(c) The term 'bank service corporation' means a corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a Federal supervisory agency."

Subsection (a) of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1862, provides:

"(a) No limitation or prohibition otherwise imposed by any provision of Federal law exclusively relating to banks shall prevent any two or more banks from investing not more than 10 per centum of the paid-in and

unimpaired capital and unimpaired surplus of each of them in a bank service corporation."

Subsection (a) of the Bank Holding Company Act, 12 U.S.C. § 1841, provides:

"(a) 'Bank holding company' means any company (1) that directly or indirectly owns, controls, or holds with power to vote 25 per centum or more of the voting shares of each of two or more banks or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of each of two or more banks; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation."

ARGUMENT

The Court Below Correctly Held the Petitioners Lack Standing to Sue, to Enjoin, a National Bank from Competing in the Data Processing Business and to Challenge the Comptroller of the Currency's Ruling Authorizing National Banks to Compete with Petitioners in Providing Such Services.

In order to avoid as much duplication as possible, Respondent, American National Bank and trust Company, adopts the statement of facts, the brief, and arguments of the Government on behalf of Respondent, Comptroller of the Currency, but would add here some additional comments.

This case involves an interpretation and application of the powers granted national banking associations as set forth in the National Bank Act, 12 U.S.C. § 24, Seventh, authorizing national banks to exercise "such incidental powers as shall be necessary to carry on the business of banking". This language is very similar to a section of the New York Statutes interpreted by the New York Court of Appeals in the case of *Curtis v. Leavitt*, 15 N.Y. 9, 55, 157 (1857). This case at page 55 quotes the incidental powers section of the New York law as follows:

> "Such associations shall have the power to carry on the business of banking by discounting bills & c., by receiving deposits, by buying and selling bullion, coins, and exchange, by loaning money on real and personal estate, *and by exercising such incidental powers as shall be necessary to carry on such business.*" (Emphasis added.)

The New York Court of Appeals on page 157 made this comment:

> "The implied powers exist by virtue of the grant, and sagacity can foresee what implied powers may, in the progress of time, the discovery and perfection of better methods of business, and the ever varying attitude of human relations, be required to give effect to the expressed powers. They are therefore left to implication."

While Petitioner claims the Administrative Procedures Act, 80 Stat. 392 (1966), 5 U.S.C. § 702 (Supp. 11, 1965-1966) is involved, this argument was rejected by the First Circuit Court of Appeals in Wingate Corp. v. Industrial Nat'l Bank, 408 F. 2d 1147, page 1151. Petitions for Certiorari pending Nos. 129 and 225 Oct. T., 1969, as did the District Court in the instant case, 279 F. Supp. 675, (A. 22, 23) and the Petitioner did not argue the application of this Act in the Eighth Circuit Court of Appeals. (See Petitioner's Petition for Writ of Certiorari in this case, page 10.) These authorities, we feel, are ample arguments in and of themselves for the proposition that the Administrative Procedures Act does not apply to the issue standing in the instant case.

The main thrust of the Petitioner's case is their attack on the Comptroller's ruling that,

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

(Oct. 15, 1966, ED. par. 3500). Thus, Petitioners would assume the role of an attorney general and would question the supervision and control of national banks and ask the courts

to take over their supervision and control in this particular field of competition.

We conclude from the arguments and authorities contained in the Government's brief that the Petitioners have no standing unless they are within a class of persons to be protected by some statute. In this connection, Petitioners would rely on the Bank Service Corporation Act, 12 U.S.C. § 1864. It is interesting to note that a national bank is not an essential ingredient to a bank service corporation as that Act provides in 12 U.S.C. § 1861(c):

> "* * * A bank service corporation means a corporation organized to perform bank services for two or more banks, each of which own part of the capital stock of such corporation and at least one of which is subject to examination by a Federal supervisory agency."

Thus, this Act was not aimed at just national banks. Notwithstanding Petitioners would claim that Section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864, was intended to protect them from competition by national banks. This Section 4 appears to be clear and unambiguous:

> "No bank service corporation may engage in any activity other than performance of bank services for banks."

Clearly, this provision applies only to bank service corporations, which, under this law, would have to consist of the combined activities of two or more banks. In spite of the lack of ambiguity, Petitioners would rely on some remarks by some of the legislators in the legislative history of this Act.

We suggest that the total legislative history of the Bank Service Corporation Act, including the specific language of the Act itself, considered with the legislative history of the so-called Antilottery Law, 12 U.S.C. § 339, should lead to the

conclusion that the Bank Service Corporation Act did not restrict the activities of any bank but only the activities of a bank service corporation which, under 12 U.S.C. § 1861(c) and § 1862(a), has to be the creature of two or more banks. Thus, Congress in the Bank Service Corporation Act limited the activities of two or more banks in combination but is silent on the same activities of a single bank. Similarly, the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 and § 1842, requires only multi-bank holding companies to divest themselves of all nonbanking interests. Thus, a single bank holding company might engage in providing data processing services directly or through a subsidiary corporation. We urge that inasmuch as the respondent Bank here is not a bank service corporation, the Bank Service Corporation Act should have no bearing on the issue of standing.

It was a well-known fact that at the time of the hearings on H.R. 8874 (which as amended later became law and is known as the Bank Service Corporation Act), that banks were doing data processing for other banks and business concerns. The opening statement of Chairman Martin of the Federal Reserve Board at the House hearing in July 1962 bears this out:

> "Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would authorize member banks of the Federal Reserve System to invest in 'bank service corporations'. * *
>
> "The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. * * *

"Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing *for other banks and business concerns.*

"Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I understand that at least six States have recently enacted laws that specifically authorize such investments by State banks." (House Hearings on H.R. 8874, 87th Congress, pages 33-34) (Emphasis added.)

Congressman Multer made it clear that the purpose of H.R. 8874 was to enable smaller banks to get access to up-to-date processing equipment and other clerical services and that it was not intended to restrict the rights or powers of banks.

"Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for

them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services." (108 Cong. Rec. 16500)

On at least one other occasion, Congress was made aware that banks were performing data processing services for customers, and this occasion was in connection with the so-called Antilottery Laws, 12 U.S.C. § 339, et seq. A bill, H.R. 10595, 90th Congress, was introduced which in its original form would have prohibited banks from performing data processing services for lotteries. The Senate made it clear that banks were to be able to continue such services by deleting the prohibition on data processing by banks for lotteries. Thus, Senator McIntyre in a letter to Senator Proxmire, printed at page 21 of the Senate Hearings on H.R. 10595, stated in part:

"* 1 * For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. *It has contracted for time on automatic data processing equipment.*

"These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies." (Emphasis added.)

On November 6, 1967, about five years after the passage of the Bank Service Corporation Act, Senator Proxmire made the following statement to the Senate committee on banking in connection with the so-called Antilottery Law, H.R. 10595, 90th Congress:

> "In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations, to engage in *record-keeping activities* and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as *record keeping, data processing,* as well as the acceptance of the proceeds of the lottery tickets sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. *Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery.* However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill." Senate Report No. 727, 90th Congress. (Emphasis added.)

Thus, it appears that Senator Proxmire understood clearly that the Bank Service Corporation Act did not prohibit banks (as distinguished from bank service corporations) from performing data processing for its customers. The original proposed Antilottery Law, H.R. 10595, had a specific provision

prohibiting insured banks from performing data processing services for lotteries which incidentally would have been unnecessary as far as national banks are concerned if they were already prohibited by national banking laws from doing so. If Senator Proxmire and other legislators were not convinced that national banks had the power to do data processing services, mere deletion of this prohibition in the proposed anti-lottery legislation would not have given such banks any additional powers. In the light of Senator Proxmire's foregoing statement and his own particular evaluation of the amendments, it wouldn't appear that he originally intended the Bank Service Corporation Act to prohibit national banks from doing data processing for bank customers or, at the very least, he recognized that no such purpose had been accomplished.

By reason of the fact that Congress did not see fit to specifically prohibit banks, as opposed to bank service corporations, from performing data processing services for their customers and the general public at the time of the passage of the Bank Service Corporation Act, and inasmuch as it went out of its way to be sure that banks would not be prohibited from doing data processing work for lotteries by amending the Act as originally proposed, it would appear that Congress has made no effort to protect petitioners as a class, and that they should not be granted any standing. Similarly, Congress, by exempting single bank holding companies from the Bank Holding Company Act, has in effect permitted banks to indirectly engage in any outside activity including data processing for the public.

If standing be granted in the instant case and a decision on the merits ensues, regardless of the outcome, it will be just a beginning of a vast amount of litigation as most every case will differ in determining what is incidental and necessary

to banking. Thus, Petitioners, in their brief, page 15, suggest that the stability and safety of banks and the possibility of serious financial losses from the installation of data processing equipment are pertinent subjects on the issue in this case of standing. We suggest that there are related economic questions. Can national banks survive without data processing equipment? Can national banks compete with those state banks permitted to do data processing for their customers? Can national banks afford to operate expensive computers a few hours a day and only after banking hours when its records are available? Should national banks, if they cannot afford to operate their own computers, be forced to turn over their records, possibly including negotiable items and confidential information of its customers for processing, to some data processing company not subject to the supervision and control of banking authorities or to its competitor in a bank service corporation? It is admitted that the Comptroller of the Currency has been granted by Congress the authority to supervise the banking system. (See page 16 of Petitioner's brief). Yet, Petitioners would urge that competitors, assuming the role of an attorney general in the guise of guardians of the public interest, should have standing to test the Comptroller's interpretation of the laws and his supervision and control of banks through litigation in the courts. Factors such as the capital structure of the bank, the nature and kind of its competition, the economics of large computers versus small computers, the percentage of data processing work done for itself as compared to other customers, the type and kind of data processing such as payroll accounts, accounts receivable, and limitless other evidentiary matters may well be pertinent, thus, to give to every competitor seeking to eliminate competition the right to challenge alleged ultra vires acts of national

banks, would result in the courts taking over in large measure the supervisory powers of the various administrative agencies charged with the duty of regulating and controlling national banking associations.

It is respectfully requested that for all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FALLON KELLY
500 Minnesota Building
St. Paul, Minnesota 55101
Counsel of Record for
Respondent American
National Bank and Trust
Company